No. 94463-6
COA No. 74738-0-I

SUPREME COURT
OF THE STATE OF WASHINGTON

COMMUNITY TREASURES d/b/a CONSIGNMENT TREASURES, a Washington not for profit corporation, JOHN EVANS and BONITA BLAISDELL, on behalf of themselves and all others similarly situated,
Petitioners

v.

SAN JUAN COUNTY, a political subdivision of the State of Washington,
Respondent

SUPPLEMENTAL BRIEF OF PETITIONER

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III. INTRODUCTION

The sole issue before the Court is whether the Land Use Petition Act (LUPA) applies to a challenge of the fee that local government imposes before reviewing an application for a land use decision. State law authorizes government to collect fees to process these applications so long as the fees are "reasonable" and so long as they are limited "to cover the cost to [government] of processing applications, inspecting and reviewing plans, or preparing detailed [SEPA] statements . . . ." RCW 82.02.020; *see also Home Builders Assoc. of Kitsap County v. City of Bainbridge Island*, 137 Wn. App. 338, 348, 153 P.3d 231 (2007). The trial court dismissed Petitioners' Complaint, finding that the exhaustion and limitations provisions of LUPA apply to Petitioners' claims.

This issue has been fairly well briefed before the Court of Appeals. However, San Juan County's answer to Petitioners' Petition for Review suggests that some clarification will be helpful to the Court. *See* San Juan County's Answer to Petition for Review [hereinafter "Answer"].

IV. ARGUMENT

A. LUPA does not apply to every decision linked in some way to a land use decision.

The primary disagreement between the parties in this matter concerns the characterization of the relationship between the fees charged to review an application and the decisions that result from that application.

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San Juan County argues that this very relationship between an application for a land use decision and the fees charged to review that application brings those fees within LUPA's scope. *See, e.g.,* Answer at 9 (discussing "inextricable link" between an application fee and the resulting land use decision). However, not every decision that relates in any way to the government's determination on a land use application is a "land use decision" under LUPA. Application fees are not "land use decisions" because the amount charged does not impact the use of land.

LUPA limits the definition of a "land use decision" to those decisions that affect the use of land. The statute defines a "land use decision" in part to mean "a final determination . . . on an application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used . . . ." RCW 36.70C.020(2)(a). The plain language of the statute refers to a permit or other approval required to engage in a project that impacts land, not any type of approval that does not affect the use of land. *See id.* A permit or other approval is obtained by applying for it. *See id.* (referencing "*an application* for a project permit or other governmental approval") (emphasis added). Finally, the statute references a "determination" on that application. *See id.* Thus, a "land use decision" is a determination that affects the use of land. *See id.; James v. County of*

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Kitsap, 154 Wn.2d 574, 586, 115 P.3d 286 (2005) (purpose of a land use decision is to manage the "impact of a development on a community"); *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 761, 49 P.3d 867 (2002) (holding development conditions must be tied to "specific, identified impacts" on development).

San Juan County and the Court of Appeals point to the county ordinance that requires the payment of an application fee to support their position that the imposition of an application fee is a "land use decision." *See* Answer at 8–9 (quoting Slip Opinion at 5) (referencing SJCC 18.80.020(C)). The quoted portion of the ordinance, entitled "Project Permit Application – Forms," addresses what must be submitted in order to obtain a decision on the application. *See* SJCC 18.80.020(C); *see also* Slip Opinion at 5 (acknowledging that "the fee is a mandatory requirement for a completed project permit application"). Thus, the application fee is a prerequisite that must be fulfilled before an applicant can get a land use decision. A decision to impose that fee is not, itself, a "land use decision"; nothing about the fee and the process for determining it affects the use of land.

San Juan County highlights this "but for" link between the payment of the application fee and the decision on the application as dispositive of this issue. "Analytically, the selection of the fee to apply,

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and the calculation of that fee, is no different from other decisions that must wait until the final decision on the application is made and then, together, are subject to appeal." Answer at 10. Yet, the County ignores the clear difference between the purpose of this fee and the purpose of the decision on the application: The purpose of the decision on the application is to manage the use of land while the purpose of the application fee is to defray the cost to the county of regulation. Every single decision on the application—without exception—is determined based on that decision's effect on land use. A review of the cases that the County cites after the quote above demonstrates this point. *See* Answer at 10–11 (citing *Heller Bldg., LLC v. City of Bellevue*, 147 Wn. App. 46, 56, 194 P.3d 264 (2008) (stop work order); *Harrington v. Spokane County*, 128 Wn. App. 202, 212, 114 P.3d 1233 (2005) (permit denial); *WCHS, Inc. v. City of Lynnwood*, 120 Wn. App. 668, 679, 86 P.3d 1169 (2004) (permit denial); *Stientjes Family Trust v. Thurston Cty.*, 152 Wn. App. 616, 624, 217 P.3d 379 (2009) (rejection of construction site plan)); *see also Cave Properties v. City of Bainbridge Island*, 199 Wn. App. 651, 401 P.3d, 327, 336 (2017) (latecomer agreement). The only case cited by the County that involves a decision that does not affect the use of land held that the decision in that case was not a "land use decision" within LUPA's scope. *See Pacific Rock Environmental Enhancement Group v. Clark*

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County, 92 Wn. App. 777, 782, 964 P.2d 1211 (1998) (hearing examiner's discovery order).

The County's discussion of "final decisions" is off topic. Plaintiffs are not alleging that all preliminary decisions made prior to the final land use decision are exempt from LUPA. Plaintiffs are arguing that the simple relationship between a preliminary decision and the final land use decision does not render the preliminary decision itself a land use decision. *See, e.g.*, *Pacific Rock*, 92 Wn. App. at 782 (hearing examiner's discovery order). The question is not whether a decision is an "interlocutory" decision linked to a land use decision. The question is whether that preliminary decision is itself a land use decision, i.e. one that affects the use of land.

To bolster its argument that the mere link between the application fee and the decision on the application pulls the decision to charge an application fee within LUPA's scope, the County quotes out of context this Court in *James v. County of Kitsap*, which analyzed LUPA's applicability to challenges to impact fees. *See* Answer at 11–12. Indeed this Court said, "Since we find that the County's imposition of impact fees as a condition on the issuance of a building permit is a land use decision, it necessarily follows that the procedures established by LUPA to challenge that decision dictate." *James*, 154 Wn.2d at 587 (quoted in Answer at 12).

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The County alleges, "This language plainly states that decisions on fees connected to a land use matter are inextricably tied to the land use decision." Answer at 12. Yet, this is not what the *James* court held. It stated,

> Thus, identification of the specific impact of a development on a community, assessment of the public facilities necessary to serve that development, and determination of the amount of impact fees needed to aid in financing construction of the facilities at the time a county issues a building permit inextricably links the impact fees imposed to the issuance of the building permit.

James, 154 Wn.2d at 586. So, it is the impact on land use that impact fees have that "inextricably links" those fees to the land use decision. *Id.* It is not the simple fact that it is a fee "connected to a land use matter" that creates this inextricable link, as the County alleges. *See* Answer at 12. If in fact this Court had meant to hold that any fee connected to a land use decision was, itself, a land use decision based on this connection, it would not have engaged in the analysis of the nature of the impact fee in *James.* Further, unlike impact fees, application fees have to be paid even if the permit will be abandoned, and even if the application for the permit is denied. Application fees are not bona fide conditions on land use permits; impact fees are.

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B. Plaintiffs are not asking the Court to "set aside" LUPA's procedural requirements.

San Juan County alleges that Plaintiffs are requesting that the Court apply equitable principles to set aside LUPA's procedural requirements. *See* Answer at 6. Plaintiffs have not invoked the court's equitable powers at any stage of the proceedings. Rather, Plaintiffs emphasize that, as a matter of law, the imposition of an application fee is not a land use decision subject to LUPA. The County assumes that Plaintiffs are invoking the court's equitable powers from Plaintiffs' discussion of the poor remedies available to Plaintiffs and those similarly situated should LUPA be applied and class action status be unavailable. *See* Petition for Review at 7–8. Plaintiffs simply point out the ramifications of lumping determinations of application fees into LUPA's treatment of land use decisions despite the differing character and purpose between application fees and decisions that affect land use.

Related to Plaintiffs' arguments regarding class action remedies, the County alleges that Plaintiffs' refer improperly to aggregates of the County's expenses purportedly incurred while processing applications, which application fees are meant to defray. *See* Answer at 4–5. The County suggests that these aggregate figures cannot be used to analyze the County's compliance with RCW 82.02.020. *Id.* The County argues that

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each instance of a charged application fee must be analyzed separate from all others. *Id.* Thus, the County argues, class action status would not be appropriate.

The trial court did not make any decisions on the proper methodology for determining whether the application fees the County has charged are "reasonable" under RCW 82.02.020. Nor did the trial court rule on Plaintiffs' motion to certify classes in this matter. The County's argument regarding the proper role of aggregate expense figures is meant to water down Plaintiffs' reference to the inadequate remedy available to applicants who have been overcharged an application fee.

The County relies on *Home Builders v. City of Bainbridge Island* in which the Court of Appeals held, "[T]he trial court erred when it reached its decision on the reasonableness of the City's permit fees based on *general accounting and cost allocation principles* and the City's costs of regulation, instead of focusing on evidence of costs the legislature specifically allowed in RCW 82.02.020." *Home Builders*, 137 Wn. App. at 350 (emphasis added). The County misinterprets *Home Builders*. The court was addressing "which costs are used in determining whether the City's fees comply with the exceptions in RCW 82.02.020 . . . ." *Id.* at 349. The City of Bainbridge argued that the list of costs should include "all costs the City attributes to its building and planning department." *Id.*;

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see also id. at 342 ("The City allocates overhead costs to the Building Subfund.") The court rejected the inclusion of all of these costs and held that the costs that could be recovered under RCW 82.02.020 were only those costs of processing applications and doing the other work listed in the statute, and that those costs could not include "a portion of all costs allowed by accounting and cost allocation guidelines for government agencies." *Id.* at 350.

There is no mention in *Home Builders* of analysis required for each application fee charged. Indeed, as the Court of Appeals pointed out in the case at bar, *Home Builders* involved a challenge to a resolution of the City of Bainbridge setting the fee schedule, not to fees already charged. *Slip Opinion* at 7 (citing *Home Builders*, 137 Wn. App. at 342–43). It would not be "reasonable" under RCW 82.02.020 to compute an application fee based on the actual cost of processing that individual application, as the County suggests. *See* Answer at 5 ("Permits should be evaluated individually . . . .").

But for the application of LUPA to Plaintiffs' claims, a class action suit is an appropriate mechanism to hold the County to RCW 82.02.020. Indeed, if LUPA applies to the imposition of application fees, recovery of overcharged fees is not reasonably practical.

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C. The "monetary damages or compensation" exception applies to Plaintiffs' claims.

The County argues that Plaintiffs are relying on the dissent in *James v. Kitsap County* when they assert that the "monetary damages or compensation" exception of LUPA, RCW 36.70C.030(1)(c), applies to their claims. Answer at 13 (discussing *James*, 154 Wn.2d at 590–95 (J. Sanders, dissenting)). The County argues that, therefore, Plaintiffs' challenge the limitations courts have placed on this exception. *See* Answer at 13. Plaintiffs' claims fit within the monetary exception as limited by the courts. In the alternative, to the extent that they do not, Plaintiffs invite the Court to overrule those cases enforcing these limitations.

1. Plaintiffs' claims are cognizable under the law.

As an aside, the County asserts for the first time in its Supplemental Brief filed one day ago that Plaintiffs have no cognizable claim under RCW 82.02.020 without LUPA. The County boldly misinterprets *James*, stating that the Court "held RCW 82.02.020 did not create a damage claim, independent of LUPA, to challenge conditions on land development." Suppl. Br. of Resp. San Juan County at 14. *James* only held that challenges to the imposition of impact fees as conditions of permits are subject to LUPA. *James*, 154 Wn.2d at 586.

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The County asserts that RCW 82.02.020 is "supplemental authority" and does not create a cause of action independent of LUPA. *Id.* (citing *Trimen Devel. Co. v. King County*, 65 Wn. App. 692, 700, 829 P.2d 226 (1992)). The issue in *Trimen* was the applicability of the 30-day limitations period in RCW 58.17.180, which applies to plat denials, to land dedication conditions in permits. *Trimen*, 65 Wn. App. at 698. Chapter 58.17 RCW was the source of authority for land dedications prior to RCW 82.02.020. *Id.* at 699.

This detour by the County has no merit. Unlike in *Trimen*, there is no other authority for the County's imposition of an application fee than RCW 82.02.020. LUPA is a procedural statute that places limits on lawsuits; it does not provide new authority for lawsuits. Thus, RCW 82.02.020 is not "supplemental authority" as the County alleges.

2. Plaintiffs' claims fall under the "monetary damages or compensation" exception as limited by *Asche*.

Beginning with *Asche v. Bloomquist*, the Court of Appeals have limited the applicability of the "monetary damages or compensation" exception of LUPA. 132 Wn. App. 784, 133 P.3d 475 (2006). Specifically, *Asche* and its progeny hold that claims for money must be made under LUPA if the underlying basis for these claims are challenges to land use decisions. *See, e.g., id.* at 801 (holding public nuisance claim

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not brought under LUPA barred when claim depends on review of land use decision). Because Plaintiffs' claims do not challenge land use decisions, the "monetary damages or compensation" exception applies, and their claims are not barred by LUPA.

Instructive is this Court's decision in *Lakey*, the only Supreme Court decision discussing the "monetary damages or compensation" exception since *James*. *See Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 296 P.3d 860 (2013). In *Lakey*, the plaintiffs brought an inverse condemnation claim against the City of Kirkland. *Id.* at 913. The trial court dismissed the claim as barred by LUPA's limitations period. *Id.* On appeal, the City argued that "LUPA extends to damage claims that a plaintiff may have that arise from issuance of a land use decision." *Id.* at 926 (edits and quotation marks omitted). This Court reversed, noting that the claim did not depend on a challenge to a land use decision. *Id.* The Court noted that the *Asche* line of cases "required a judicial determination that a land use decision was invalid or partially invalid." *Id.* However, the claim of the plaintiffs in *Lakey* did not require such a determination. *Id.*

Plaintiffs challenge the application fees that were imposed prior to the County's consideration of their land use applications. They do not challenge the County's decisions on those applications, i.e. the permits

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that were issued or the conditions placed on them. Because their monetary claim does not challenge any land use decision, their claim is not barred by LUPA.

3. *Asche* and similar cases should be overruled.

It is not lost on Plaintiffs that they use essentially the same analysis to argue that the imposition of application fees is not a "land use decision" under LUPA as they do to argue that a claim for reimbursement of overcharged fees falls under LUPA's monetary exception. This observation highlights the problem with *Asche* and its progeny. The analytical framework devised by the Court of Appeals to determine the applicability of the monetary exception depends on a determination of whether a monetary claim relies on a review of a land use decision. Thus, according to the Court of Appeals, if a monetary claim requires a challenge of a land use decision, not only does LUPA apply under RCW 36.70C.030(1), which mandates that LUPA "shall be the exclusive means of judicial review of land use decisions," the monetary exception under RCW 36.70C.030(1)(c) does not apply for the very same reason: because the monetary claim challenges a land use decision. This interpretation of the statute renders the monetary exception superfluous.

With regard to monetary claims, the "application" section of LUPA, RCW 36.70C.030, envisions a two step process. First, the section

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states that LUPA is "the exclusive means of judicial review of land use decisions." RCW 36.70C.030(1). In other words, in this first step, if a decision meets the definition of a "land use decision" found in RCW 36.70C.020(2), then LUPA normally applies. Second, the section lists several exceptions, one of which is the so-called "monetary exception" relevant here. *Id.* ("except that this chapter does not apply to . . . ."). *Asche* and its progeny do not engage in a two-step analysis.

In *Asche*, the plaintiffs brought a public nuisance claim against their neighbor claiming that the neighbor's new construction, built pursuant to a permit issued by Kitsap County, violated the city code. *Asche*, 132 Wn. App. at 789. The *Asche* court recognized that, due to the monetary exception, "LUPA would not seem to bar suit." *Id.* at 800 (discussing RCW 36.70C.030(1)(c)). However, the *Asche* court compared the plaintiff's claim to the definition of "land use decision" in LUPA and determined that plaintiffs' claim required review of a land use decision, and thus was barred under LUPA. *Id.* at 801. The court never circled back to decide if the monetary exception applied. The fact that the claim challenged a land use decision took the claim out of the monetary exception. *Id.*

Similarly, in *Mercer Island Citizens For Fair Process v. Tent City 4*, the plaintiff sought damages for a civil rights violation arising out of the

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City of Mercer Island's issuance of a temporary use permit. 156 Wn. App. 393, 397, 232 P.3d 1163 (2010). Citing *Asche*, the court held that the monetary exception does not apply to the plaintiff's claim for damages because it was based on a challenge to the legality of the temporary use permit. *Id.* at 405. Again, the court did not embark on any analysis of the monetary exception independent of its analysis of whether the claim constituted judicial review of a land use decision.

In *Tapps Brewing Inc. v. City of Sumner*, a federal court considered challenges to a "general facility charge," imposed as a condition of a permit. 482 F.Supp.2d 1218, 1224 (W.D. Wash. 2007). The general facility charge was designed to pay for reconstruction of a drainage system. *Id.* at 1223. The plaintiffs challenged the charge under RCW 82.02.020. *Id.* at 1232. They claimed that their challenge fell under the monetary exception of LUPA. *Id.* at 1233. The court did not analyze this exception and instead cited to this Court's decision in *James* as binding authority. *Id.* (citing *James*, 154 Wn.2d at 583–84). Although the federal court did not engage in the same analysis as the *Asche* line of cases, the result was the same.

Those cases that have found the monetary exception applicable have done so because the monetary claim does not challenge a land use decision. *See Lakey*, 176 Wn.2d at 926 (discussed *supra*); *Woods View*

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III, LLC v. Kitsap County, 188 Wn. App. 1, 352 P.3d 807 (2015) (damages from a delay in processing permits). In those cases, LUPA did not apply because there was no judicial review of a land use decision AND because the monetary exception applied.[1]

Thus, all of these cases link the determination of whether the monetary claim requires "judicial review of land use decisions," *see* RCW 36.70C.030(1), with the determination of whether the exception for "[c]laims provided by any law for monetary damages or compensation" applies, *see* RCW 36.70C.030(1)(c). There are no cases holding that the exception applies even though the claim challenges a land use decision. This framework ignores the two-step analysis mandated by the statute and eliminates the monetary exception.

This Court has not weighed in on the *Asche* analysis. In *James*, perhaps in answer to Justice Sanders' lengthy dissent in which he asserted that the monetary exception to LUPA applied to that case, the majority simply noted, "At no time have the Developers argued they are not subject to the procedural requirements of LUPA because their claims fall within one of the exceptions enumerated in RCW 36.70C.030(1)." *James,* 154

[1] In a footnote, the Court of Appeals in *Liberia v. City of Port Angeles* noted without analysis that, since the claim on appeal in that case was for monetary damages only, the monetary exception to LUPA applied. 178 Wn. App. 669, 675 n.6, 316 P.3d 1064 (2013).

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Wn.2d at 586–87. In *Lakey*, this Court noted that the *Asche* line of cases did not apply but did not comment on whether the analysis in *Asche* and its progeny is correct. *Lakey*, 176 Wn.2d at 926.

As Justice Sanders noted, prior to LUPA's enactment, attacks of a land use decision were accomplished through a writ of certiorari or through a claim for damages or both. *James*, 154 Wn.2d at 591 (J. Sanders dissenting). When enacting LUPA, the legislature made two important statements: first, LUPA is intended to replace the writ of certiorari; RCW 36.70C.030(1) ("This chapter replaces the writ of certiorari for appeal of land use decisions . . . ."); and second, claims for damages or compensation are excluded from LUPA; RCW 36.70C.030(1)(c). The statute contemplates suits that both challenge a land use decision and seek damages or compensation. *Id.* ("If one or more claims for damages or compensation are set forth in the same complaint with a land use petition brought under this chapter . . . ."). In the event both types of claims are joined in one complaint, the LUPA procedures do not apply to the monetary claims. *Id.*; *see also Shaw v. City of Des Moines*, 109 Wn. App. 896, 37 P.3d 1255 (2002) (procedurally separating the "LUPA appeal" from the concurrent claim for damages). Why would the legislature clearly separate those claims that used to be brought by seeking a writ of certiorari on the one hand from monetary claims on the

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other if the monetary claims that involve review of a land use decision must be brought under LUPA's procedural rules?

With due respect to Justice Sanders, the monetary claims in *James* and *Tapps Brewing* are analytically more challenging than in the other cases that have considered the monetary exception. Both cases involve impact fees that were imposed as conditions of permits. *James*, 154 Wn.2d at 579; *Tapps Brewing*, 482 F.Supp.2d at 1223. Unlike the monetary claims in every other case considering the monetary exception, impact fees themselves directly impact land use. *See James*, 154 Wn.2d at 586 (holding that the fact that impact fees directly affect land use "inextricably links" them to the permit). Even though the suits in these cases were for money, the effect of the remedy sought by the plaintiffs would have been to undo a determination that directly affects land use. The monetary claims in the other cases were subsidiary to the underlying land uses decisions, and if those claims were successful, the underlying land use decisions would not have been modified. Respectfully, perhaps Justice Sanders had the right argument for the wrong case.

Modifying the *Asche* limitations honors the purpose of LUPA, which is in part to provide "timely judicial review." RCW 36.70C.010. The short limitations period in LUPA is designed to bring quick finality to decisions that affect the use of land. *See Samuel's Furniture, Inc. v. Dept.*

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of Ecology, 147 Wn.2d 440, 450, 54 P.3d 1194 (2002); *see also Skamania County v. Columbia River Gorge Comm'n*, 144 Wn.2d 30, 48, 26 P.3d 241 (2001) (recognizing "the strong public policy favoring administrative finality in land use decisions"). "If there were not finality, no owner of land would ever be safe in proceeding with development of his property." *Skamania County*, 144 Wn.2d at 49 (quoting *Deschenes v. King County*, 83 Wn.2d 714, 717, 521 P.2d 1181 (1974)).

Application of the normal limitations periods to monetary claims does not degrade LUPA's purpose of finality. There is great momentum in land use projects, e.g. houses built, land cleared, wetlands drained. However, there is no feature of monetary claims involving land use that sets those claims apart from other monetary claims. Certainly a party who breaches a contract would prefer finality short of the three- or six-year limitations period. Landowners and government acting on land use decisions would prefer the same. However, unlike claims attempting to modify or reverse land use projects that arise out of land use decisions such as construction of structures, resolution of monetary claims that arise out of land use decisions have no more urgency than any other type of monetary claim.

In the instant case, Plaintiffs do not seek to modify any of the County's decisions that affects the use of land. Their claims would not

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have traditionally been brought by seeking a writ of certiorari. They are simple claims for reimbursement of the amounts the County has overcharged for application fees. These claims therefore fall under the exception for "monetary damages or compensation." *See* RCW 36.70C.030(1)(c). The Court should engage in a two-step process to determine, first, whether Plaintiffs' claims require judicial review of land use decisions, and second, if so, whether they fall under the exception for "monetary damages or compensation."

V. CONCLUSION

San Juan County's attempt to shield itself from enforcement of RCW 82.02.020 by hiding behind LUPA should fail. The decision to impose application fees are not land use decisions under LUPA, and claims seeking reimbursement of overcharges of those fees are monetary claims excepted from LUPA. The Court should reverse the Court of Appeals and the trial court and remand for further proceedings.

Respectfully submitted,

BRANDLI LAW PLLC

Dated: October 6, 2017

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